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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHERN PACIFIC COMPANY

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INDEX

Cases Cited

OTHER AUTHORITIES CITED

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BRIEF FOR RESPONDENT SOUTHERN PACIFIC COMPANY

Opinions Below

The District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but made findings of fact and conclusions of law (R. 127-143). The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 246-254) is reported in 98 F. (2d) 160.

Statute Involved

The Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, 31 U. S. C. A., Section 463, is set forth in appendix. It will be referred to hereafter as the Joint Resolution.

Statement of Case

The facts in this case have been stated in the brief of the other respondents. This statement is confined to facts pertinent to the additional point raised by this respondent against a discrimination in the application of the Joint Resolution against gold-clause bonds and in favor of bonds such as the Debtor's First Terminal and Unifying Bonds containing an option on the part of the holder to receive the equivalent of United States gold coin, of the weight and fineness existing at the time of issue, in foreign moneys.

Southern Pacific Company is a holder as pledgee of $23,903,000, face amount, of the Debtor's General and Refunding Mortgage Five Per Cent Gold Bonds. By these bonds the Debtor promised to pay to the holders the face amount thereof in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed on the first day of July, 1930. Other bonds issued under other indentures of the Debtor likewise contain provisions for payment in gold coin of the United States of the standard of weight and fineness existing at the time of the issuance of the bonds. These facts were stipulated (R. 168) and included in the Court's findings below (R. 129).[1]

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[1]Southern Pacific Company is also the owner of approximately 87% of the capital stock of the Debtor. Despite the assertions on page 30 of the brief of Harry Hoffman, *amicus curiae*, it is not apparent to us that this fact precludes the Southern Pacific Company from presenting any point properly open to it as the holder of the Debtor's gold bonds.

Without reviewing here the facts as to the issue of the First Terminal and Unifying Bonds fully stated in the brief of the other respondents, it is sufficient to note that these bonds were issued in this country to American purchasers to evidence liability for United States money borrowed, and there is no evidence that the bonds concerned in the trial below of the petitioner's claim belong to other than American citizens (R. 133, 135).

Southern Pacific Company, as a stockholder and creditor of the Debtor, was authorized to file protest to proofs of claim against the Debtor under Subdivision (c) (13) of amendatory Section 77 of the Bankruptcy Act, Title 11, United States Code, Section 205, and under Section 57 of the Bankruptcy Act, Title 11, United States Code, Section 93 (d). It filed a protest and supplemental protest to proof of claim of the petitioner, as Trustee of the First Terminal and Unifying Bonds. It pleaded therein all of the grounds of protest included in the protest and supplemental protest filed by the other respondents herein. In addition, after stating preliminary facts, it alleged in Paragraph 3 of its protest:

> "that if the said Joint Resolution of Congress of June 5, 1933, should be interpreted to render invalid the provisions contained in the said General and Refunding Mortgage Gold Bonds for payment in gold coin of the United States of America of the standard of weight and fineness existing on July 1, 1930 and not to render invalid or ineffective the above set forth provisions of the First Terminal and Unifying Bonds for payment in United States gold coin, or, at the option of the holder, in specified foreign moneys, intended as the equivalent of such gold coin, and should cause or permit the claims in behalf of the holders of said First Terminal and Unifying Bonds to be enhanced by reason of the said multiple currency provision, at the cost and expense of the holders of the General and Refunding Bonds, the said Joint Resolution of Congress of June 5, 1933, as so interpreted and applied, would be arbitrary, capricious, and would

discriminate without reasonable basis, against the holders of General and Refunding Mortgage Bonds, containing gold clauses, and in favor of the holders of First Terminal and Unifying Bonds, containing the said multiple currency provision, and would deny to this protestant and to other holders of the said General and Refunding Bonds the equal protection of the laws and it and they would be deprived of property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America;". (R. 117.)

The decisions of the Courts below to the effect that the First Terminal and Unifying Bonds were obligations payable in money of the United States to be discharged upon payment, dollar for dollar, in present United States legal tender, obviated the discrimination feared by this respondent and which will exist if petitioner prevails in this case.

Summary of Argument

I. The foreign money options contained in the Debtor's First Terminal and Unifying Bonds served the same purpose, of assuring against the future depreciation of the dollar, and gave the same measure of recovery, in an action upon the bonds, as did the gold clause contained in the Debtor's other bonds. Upon the facts in this case, it is clear that the amounts of foreign moneys named in the foreign money options were intended as the equivalents in value of 1000 dollars in United States gold coin, and the purchasers of the bonds did not desire the foreign moneys as such. The American purchasers and holders of the Debtor's gold-clause bonds are similarly situated in every material respect with the American purchasers and holders of the Debtor's First Terminal and Unifying Bonds.

II. An interpretation of the Joint Resolution which strikes down the gold clause, but leaves untouched the foreign money options, discriminates arbitrarily and capriciously against the holders of gold-clause bonds and in favor of holders, similarly situated, of bonds payable in United States money containing foreign money options and, in this case, the resultant favorable treatment of the holders of the foreign money option bonds causes a corresponding detriment to the holders of gold-clause bonds who otherwise would have shared *pari passu.* The Joint Resolution, if so interpreted, offends against the Fifth Amendment to the Constitution of the United States.

III. To interpret the Joint Resolution so as to permit such arbitrary classification, violates the principles of statutory construction that a statute should not be interpreted so as to give rise to grave doubts as to its constitutionality, and should not be interpreted so as to cause hardships and unwarranted discriminations. The Joint Resolution should be interpreted, as it was by the Courts below, to effectuate its purpose and in accordance with the rule requiring that exceptions from the general policy which the law embodies should be strictly construed.

IV. The Joint Resolution may and should be interpreted so as to direct the discharge of the Debtor's First Terminal and Unifying Bonds upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender.

ARGUMENT

I

The foreign money options contained in the Debtor's First Terminal and Unifying Bonds served the same purpose, of assuring against the future depreciation of the dollar, and gave the same measure of recovery, in an action upon the bonds, as did the gold clause contained in the Debtor's other bonds. Upon the facts in this case, it is clear that the amounts of foreign moneys named in the foreign money options were intended as the equivalents in value of one thousand dollars in United States gold coin, and the purchasers did not desire the foreign moneys as such. The American purchasers and holders of the Debtor's gold-clause bonds are similarly situated in every material respect with the American purchasers and holders of the Debtor's First Terminal and Unifying Bonds.

The purpose of the gold clause was to afford a definite standard of value and to protect the creditor at the expense of the debtor against depreciation of the dollar. *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 302.

A like purpose was served by the foreign money options contained in the Debtor's First Terminal and Unifying Bonds. The District Court found (R. 134):

> "the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the 'gold clause' contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar."

The Circuit Court of Appeals concluded (R. 252, 253):

> "The effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912. The provision afforded a facile method by which every bond and interest coupon of the indebtedness—whether owned abroad or in this country—could be easily converted into payment in domestic gold dollars

of a given weight and fineness or the foreign money (measured thereby) most advantageous to the holder at the time of payment. Since the face amount of the obligations is calculated in terms of the gold dollar at a specific date, the real effect is to give an option of payment in the most advantageous money (foreign or domestic) which, at the time of payment, nearest approaches the specified gold dollar value. By the simple expedient of immediately purchasing 'dollars' after securing payment in guilders, pounds, marks or francs, the holder acquires, within the United States, a substantial premium over what could have been realized by receipt of payment in the United States. Hence, the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a four-fold further assurance in these foreign currencies of values based on the specified gold dollar."

These findings were made upon the facts of this case. The record herein establishes conclusively that the Debtor's First Terminal and Unifying Bonds were United States money contracts, that the amounts of foreign moneys mentioned in the options were intended as and were expressed to be the equivalents in value of the face amount of the bonds as expressed in United States gold coin, and that the bondholders did not desire foreign moneys as such.[2] The following evidentiary facts sustain these conclusions.

(a) The bonds were sold by an American railroad company to American purchasers (R. 158, 160).[3]

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[2]cf: *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324, 335—"The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry."

[3]As late as July 1, 1935, the holdings of these bonds outside of this country were very limited (R. 198). Of 1,730 holders, only 37 did not reside within this country. At that time none of the foreign holders held a substantial number of these bonds, with the exception of Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, represented by Harry Hoffman, *amicus curiae* herein. His client's holdings were obtained after the adoption of the Joint Resolution, as he frankly admits on page 41 of his brief in this Court. Evidently additional bonds of this issue have been purchased by Liechtenstein corporations represented by Mr. Hoffman since 1935, see his brief, page 2.

(b) The bonds were sold for American dollars and were the negotiable evidences of an American dollar debt (R. 160).

(c) The record is devoid of the slightest relationship of these American money borrowing contracts to the guilder or to any other foreign money.

(d) The primary nature of the promise to pay dollars is evidenced by the following indenture provisions to the effect that the bonds shall in all cases be payable in United States gold coin in New York, although they may be also payable in other places in other moneys:

> "said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France)" (R. 18).
>
> "Whereas, the First Terminal and Unifying Mortgage Coupon Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of $1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D.R.W., or in Paris, France, 5180 francs;". (R. 18, 19.)

The amounts of foreign moneys in which the coupon bonds might also be payable are expressly stated in the indenture to be the equivalents of $1,000 United States gold coin, both in the passage above quoted and in Article First, Section 4:

"but the face amount of each of such coupon bonds shall be $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth." (R. 39.).

(e) That the parties assumed that the amounts of foreign moneys mentioned in the foreign money options were the equivalents of $1,000 of United States gold coin is further evidenced by the arrangement that coupon bonds containing gold clauses and foreign money options (R. 19) were interchangeable (R. 36) with registered bonds containing the gold clause alone (R. 22).

(f) A coupon bond in the face amount of $1,000 United States gold coin, but containing foreign money options, could be issued under the indenture upon expenditure by the Debtor of $1,000, for capital expenditures or prior debt retirement (R. 40, et seq.), a provision only consistent with the assumption that the foreign money options called for the equivalents of $1,000 in United States gold coin.

(g) From the time these bonds were issued in 1912 until July 1, 1935, after the reduction in the value of the United States dollar, there was not a single request for payment of coupons appurtenant to these bonds in guilders, in Amsterdam or elsewhere (R. 198).

The petitioner in effect concedes that the foreign money options were not inserted because of a desire of the holders of the bonds for the foreign moneys as such, but that instead they were inserted as a measure of the United States money value which would ultimately inure to the holders by reason of the foreign money options. On page 21 of its brief, it says:

"The contention will be made that the foreign money alternatives were intended for the benefit of

aliens only, and not of citizens, and that most of the bondholders whom the petitioner represents are Americans. No indication of such an intent can be found within or outside of these instruments. The bonds were sold to an original group of American purchasers (R. 132-4) whose attention was specifically called to the fact that they were payable in foreign currencies, at the election of the holder (R. 133-4, 160). There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers at the time of sale, that the holder could receive payment only in the currency of his domicile."

Petitioner combats the conclusion that the amounts of moneys mentioned in the foreign money options were intended as the equivalents of United States gold coin of the 1912 standard of weight and fineness. On January 1, 1912, the United States, England, Holland, Germany, and France were all upon the gold standard and in such circumstances the only fluctuations in value between the moneys of these countries would be those too small to be corrected by gold shipments. *Escher, Modern Foreign Exchange,* 55, 58, 59; *York, International Exchange,* 43. As has been emphasized by writers upon foreign exchange, where the countries involved are upon the gold standard, "The basic fact underlying the general principles of foreign exchange between gold standard countries is that money payments in those countries are in essence gold deliveries made at a particular time and place. Assuming the absolute gold standard in the United States, the American merchant who pays $10,000 for goods with a check on his bank, to all intents and purposes orders the bank to deliver immediately on his behalf to the seller at its office 232,200 grains (10,000 X 23.22) of the gold it owes him, that is, of the deposit balance." (York, *supra,* page 19; and see page 22). It was possible in 1912 to state the equivalent of $1,000 United States gold coin in the money of a foreign country, and that equivalence would continue so long as the international gold standard functioned.

Why was it that the foreign money options were inserted in the bonds, since it appears that the transaction had no international aspects whatever? The finding on this point by the District Court is (R. 134) that the foreign money options were an additional assurance to the holders of securing the value of United States gold coin of the 1912 standard. This is the only rational conclusion in the light of the lack of any relationship of the transaction to any foreign money. It is the proper conclusion, whether the parties gave great or little weight to the further protection afforded by the foreign money options. In either event the intent was for the Debtor to assure the creditor of the receipt of the value of the United States gold coin face of the bonds.

The foreign money options contained in the First Terminal and Unifying Bonds afforded the same type of protection as did the gold clause contained in the Debtor's bonds. It has now been authoritatively established that the gold clause provision as contained in the Debtor's bonds, if valid, gives the holders of the bonds a right to receive from the obligor an increased amount of currency to compensate for a devaluation of the gold content of the dollar or other monetary unit. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 302; *Feist* v. *Societe Intercommunale Belge d'Electricite*, L. R. [1934] A. C. 172, 173, 88 A. L. R. 1524; see Mr. Justice Stone's concurring opinion, *Smyth* v. *United States*, 302 U. S. 329, 361. In the absence of the Joint Resolution, and if there were a free market for gold, the holders of the gold-clause bonds would be entitled to receive $1,690 per thousand dollar bond, approximately the amount that the petitioner is claiming here in respect to the First Terminal and Unifying Bonds.

The recovery per bond in respect to the guilder option contained in the First Terminal and Unifying Bonds asserted by the petitioner in this case is practically identical to the recovery per bond whch would be realized upon

gold-clause bonds if the Joint Resolution had not been adopted. The option sought to be exercised by petitioner was for 2,490 guilders, and that number of guilders was in 1912 the equivalent of $1,000 of United States gold coin of the standard of weight and fineness existing on January 1, 1912 (R. 134). This is a matter of calculation from the stipulation to the effect that the guilder was then worth $.4020 (R. 168). The petitioner seeks to sustain a claim upon the basis of approximately $1,690 per bond for $1,000 of United States money face (R. 105).

In the absence of the Joint Resolution, the protection against the depreciation of the dollar which this petitioner secured through the gold clause was as full and complete as the protection afforded by the foreign money options of the First Terminal and Unifying Bonds. The accuracy of this statement is not defeated by pointing out, as petitioner does, pages 25 to 27, its brief, that the guilder may depreciate in value so as to diminish somewhat the protection afforded by the optional provision. So too, the completeness of the protection of a valid gold clause may be defeated by the lack of a free market for gold. *Perry v. United States*, 294 U. S. 330. The fact remains that the gold-clause obligee and the obligee of bonds with foreign money options had alike contracted for protection against depreciation of the United States monetary unit.

If monetary conditions had remained as they were in 1912, the measure of protection provided by the gold clause provision and by the guilder and other foreign money options would have been substantially the same. If the United States and Holland had each continued on the gold standard as it existed in 1912, the maximum value of the guilder would be its gold par, $.4020 (R. 168), plus the comparatively slight cost of shipping gold from the United States to Holland, *Goschen, The Theory of the Foreign Exchanges* (4th Ed.), page 47, and it would have made no substantial financial difference whether a bondholder had elected to receive $1,000 in United States gold coin or 2,490 guilders.

If Holland suspended the delivery of gold for guilders or reduced the gold content of the guilders, while the United States continued on its pre-existing gold standard, the United States gold coin clause, if valid, would be the more effective protection against monetary depreciation. On the other hand, since United States gold coin of the 1912 gold content became unobtainable in the United States in 1933 and the guilder remained on the previous gold basis until September 27, 1936 (R. 140), the guilder option, if valid, during these years provided a method of preserving to the bondholders the value of the 1912 United States gold coin.[4] Since September 27, 1936 (R. 140), both the dollar and the guilder are worth less than the value of the gold to which they were respectively equivalent in 1912. Since the guilder has depreciated less than the dollar, the guilder option partially accomplishes the object of compensating the creditor at the expense of the debtor against monetary depreciation. To sum up, under a continuation of the pre-war gold standard, either the gold clause or the foreign money options would secure to the bondholder the value of United States gold dollars of the 1912 standard; the fortuities of war and depression which lead to monetary devaluation and artificial monetary controls might prevent either the gold clause or the foreign money options from carrying out such assurance to the creditor, or might result in one clause being effective and the other ineffective. Both types of clauses were designed to, and each clause was effective to some extent (absent legislation such as the Joint Resolution) in safeguarding the creditor at the expense of the debtor against monetary devaluation.

Petitioner has suggested no vital difference, justifying different treatment under the Joint Resolution, between the American holders of the Debtor's First Terminal and Unifying Bonds and the many American holders of bonds of

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[4] The petitioner claims that the guilder should be valued for the purposes of its claim on December 12, 1935, or, alternatively, upon certain other dates prior to September 27, 1936 (R. 105).

American companies containing the gold clause. All of these bondholders must receive their money and meet their expenses and obligations in money of the United States. No relationship of the issue of the First Terminal and Unifying Bonds to guilders or any other foreign moneys has been or can be pointed to. Petitioner relies solely upon the proposition that the holders of bonds payable in United States money, with optional provision for payment in foreign moneys, astutely or fortuitously obtained a provision guarding against dollar depreciation which, because of the comparatively small number of bonds containing such a provision, escaped the notice of Congress when it passed the Joint Resolution. In no view of the Joint Resolution do we think this proposition true, but certainly we submit the Joint Resolution must be applied to the bonds in the instant case when the very indenture securing the bonds and upon which the petitioner's claim is based identifies the guilders sought as the equivalent of the principal amount of the bonds as expressed in United States gold coin (R. 39). True it is, as petitioner says, page 25 of its brief, 2,490 guilders were determined to be the equivalent of $1,000 of United States gold coin of the standard of weight and fineness existing on January 1, 1912, and there was no provision in the indenture for the number of guilders to decrease with a reduction in the standard of weight and fineness of the dollar. It is not true that this consideration weighs against the application of the Joint Resolution. The very reason why these bonds should be dischargeable, dollar for dollar, in United States legal tender, irrespective of the foreign money options, is that the foreign money options give to the holder the equivalent of the gold coin of the standard of weight and fineness existing prior to the reduction in the gold content of the dollar in 1934. If the foreign money options provided that the number of foreign monetary units should decrease with a depreciation of the monetary unit of this country, there would have been no point in legislation to render such options ineffective.

The brief of Harry Hoffman, *amicus curiae,* stresses (p. 23 thereof) the following quotation taken from article of Professor Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. L. R. 569, 575: "However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint." We need not consider whether this is true where the foreign money option is inserted in an international contract. It seems to us that this record shows conclusively that on the facts of this case there is no diversity from either an economic or political standpoint between the gold clause provisions and the foreign money options in these bonds sold and held domestically.

There are two classes of persons before this Court. One class is composed of American lenders who bargained to be paid in gold coin of the United States of a certain standard of weight and fineness, or in an amount of currency equivalent thereto. The other class is composed of American lenders who bargained to be paid in gold coin of the United States of a certain standard of weight and fineness, or in an amount of foreign moneys equivalent thereto. Neither class may receive gold coin which is no longer in circulation, and the claims of both classes must be allowed in terms of United States currency in a reorganization proceeding. We submit there is no substantial difference in the situation of the two classes justifying a hostile discrimination against one class and in favor of the other class.

II.

An interpretation of the Joint Resolution, which strikes down the gold clause, but leaves untouched the foreign money options, discriminates arbitrarily and capriciously against the holders of gold-clause bonds and in favor of holders, similarly situated, of bonds payable in United States money containing foreign money options and, in this case, the resultant favorable treatment of the holders of the foreign money option bonds causes a corresponding detriment to the holders of gold-clause bonds who otherwise would have shared pari passu. The Joint Resolution, if so interpreted, offends against the Fifth Amendment to the Constitution of the United States.

In the absence of the Joint Resolution, the holders of the First Terminal and Unifying Bonds and the holders of the Debtor's gold-clause bonds would have shared ratably in the assets of the Debtor, subject only to differences in the varying mortgage liens.

If the Joint Resolution should be interpreted as applicable to both First Terminal and Unifying Bonds and the Debtor's other gold-clause bonds, and as directing that all such bonds shall be payable, dollar for dollar, in United States currency, the relative rights of the parties will remain undisturbed—the First Terminal and Unifying Bonds and the gold-clause bonds would continue to share ratably in the mortgage estate, subject to the respective mortgage priorities.

If the Joint Resolution is interpreted to direct the discharge of the Debtor's gold-clause bonds, dollar for dollar, in United States currency, but not so to direct the discharge of the First Terminal and Unifying Bonds, the parity between the two classes of bonds will be disturbed. Not only will the First Terminal and Unifying Bonds receive better treatment than the holders of the Debtor's gold-clause bonds, but the preferential treatment accorded the First

Terminal and Unifying Bonds will be largely at the expense of the gold-clause bondholders. The First Terminal and Unifying Bondholders will take more, and the gold-clause bondholders will take less, than they would otherwise. If the assets of the Debtor were being sold and the proceeds of sale distributed ratably between the creditors, it would be obvious that an expansion of the claim of one creditor would diminish correspondingly the portion to be received by other creditors. This is equally true where securities upon a reorganization are to be distributed instead of cash upon liquidation. Indeed, if the Joint Resolution had not been passed by Congress and sustained by the Supreme Court, the petitioner purporting to act for holders of the First Terminal and Unifying Bonds would have no motive in seeking to enforce the guilder option. The disparity, advantageous to the First Terminal and Unifying Bondholders, which would result in applying the Joint Resolution to one form of contract guarding against dollar devaluation and not to another contract accomplishing the same result, is the occasion for insistence by the Guaranty Trust Company on its present claim. The petitioner finds in discrimination an opportunity for advantage.

When hearings were had upon the reorganization plan of the Debtor before an Examiner of the Commission and Mr. Commissioner Mahaffie, the discrimination inherent in the claim of Guaranty Trust Company of New York in behalf of the First Terminal and Unifying Bondholders was brought out clearly in a colloquy between Mr. Commissioner Mahaffie and the witness, Mr. Glines, the Chairman of the Protective Committee for the First Terminal and Unifying Bondholders (Reporter's Minutes, St. Louis Southwestern Railway Company—Reorganization—I.C.C. F.D. No. 11040, pp. 686-689):

> "Commissioner Mahaffie: Well, assuming you have dollar claims or gold claims, expressed in the terms of the bond as originally issued, it is payable, I assume in gold, how do you justify that different treatment

in reorganization on a defaulted issue of a bond issue payable in Guilders than one payable in gold coin of a certain fineness?

"The Witness: Mr. Mahaffie, I do see a difference.

"Commission Mahaffie: What is it?

"The Witness: The difference is that the company has covenanted to pay in any one of different forms of money. The difficulty in answering your question in one way arises through the fact that foreigners buy these bonds because they want their income in the money of their country. The time arises when it is impossible to distinguish between the foreign holder who bought it on that basis and the domestic holder who might have gone abroad and likely is now foreign. Therefore, the only way that I know of to treat them is to treat them all alike.

"Commissioner Mahaffie: Now, that was not quite the distinction I was trying to get your explanation on.

"My point is: I assume these bonds were supposed to be payable in gold of a definite standard?

"The Witness: That is right, or the pound Sterling, or whatever it is, the reich mark or franc, and so on.

"Commissioner Mahaffie: Now, your bond is defaulted?

"The Witness: Yes.

"Commissioner Mahaffie: You are having to replace it in reorganization proceedings?

"The Witness: Right.

"Commissioner Mahaffie: Why should greater emphasis be given in the proceeding to such a guilder clause than to the, we will say the Gold Clause?

"The Witness: You are asking me a legal question, and I am not a lawyer, as I said."

The First Terminal and Unifying Bonds are worded differently from other gold-clause bonds of the Debtor, but the result is the same, in that as a result of both forms of bonds, an increased number of dollars is secured in order to compensate for the reduction in the gold content of the dollar.

The Fifth Amendment to the Constitution of the United States, prohibiting Congress from depriving any person of

property without due process of law, condemns acts of Congress arbitrarily and capriciously discriminating between classes of persons without reasonable basis. *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 359, 360; *Brushaber* v. *Union Pacific R.R.*, 240 U. S. 1, 24; *Knowlton* v. *Moore*, 178 U. S. 41, 77; *Sims* v. *Rives* (Ct. A., D. C.), 84 F. (2d) 871, 878. We do not believe that there is an adequate basis for discrimination where two classes of persons standing in the same position contract for the same protection, with variation only in device employed for the accomplishment of the result, especially where the protection of one class would be at the expense and cost of the other. We do not discuss the constitutional question further because the considerations pertinent thereto are equally cogent as arguments in favor of the interpretation of the Joint Resolution contended for by respondents.

III.

To interpret the Joint Resolution so as to permit such arbitrary classification, violates the principles of statutory construction that a statute should not be interpreted so as to give rise to grave doubts as to its constitutionality, and should not be interpreted so as to cause hardships and unwarranted discriminations. The Joint Resolution should be interpreted, as it was by the Courts below, to effectuate its purpose and in accordance with the rule requiring that exceptions from the general policy which the law embodies should be strictly construed.

An interpretation of a statute which will render it unconstitutional or even raise serious doubts as to its constitutionality will not be adopted when there is another interpretation which will avoid such constitutional questions. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 30. Furthermore, an interpretation is to be favored which does not result in unreasonable and oppressive discriminations, and consideration must be given to all persons affected, and not

only to those before the Court in the particular case. *Bloomer* v. *McQuewan*, 14 How. 539, 553; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285, 286. In interpreting a statute the purpose to be accomplished and the mischief to be remedied must be considered, and the statute should be interpreted to effect the purpose ascertained from a view of the pertinent legislative and administrative history. *Royal Indemnity Co.* v. *American Bonding Co.*, 289 U. S. 165, 169; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 303, 308; *Heydenfeldt* v. *Daney Gold & S. Mining Co.*, 93 U. S. 634, 638. A statute should be construed to effectuate its remedial purpose and there should be applied "the elementary rule requiring that exceptions from the general policy which a law embodies should be strictly construed". *Spokane & Inland R. R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311.

The keynote running through the Congressional discussion of this legislation prior to its enactment was equality and lack of discrimination. Some extracts from the Congressional Record, 73d Congress, 1st Session, appear on pages 85 to 88 of brief of the other respondents. It is sufficient here to point out that Mr. Steagall, the Chairman of the Committee in charge of the Resolution in the House of Representatives, said (Cong. Rec. 73d Cong., 1st Session, at p. 4586):

> "If I had my way I would not under any conditions permit one citizen to contract for the discharge of a debt in one kind of currency and another citizen to contract for the discharge of a debt in another kind of currency. It seems to me sound public policy demands that there be no discrimination."

If we are correct in our view that the method of discharge of the Debtor's First Terminal and Unifying Bonds is plainly prescribed by the second sentence of the

Joint Resolution, there is no room for the application of rules of statutory construction. But counsel for petitioner has urged earnestly that the Joint Resolution does not so provide, and in this connection contends that restricted meanings should be ascribed to the words "obligation" and "payable" as used in the Joint Resolution. If there is ambiguity, the principles of construction mentioned above have application and lead, we believe, to the interpretation of the Joint Resolution made by the Courts below.

IV.

The Joint Resolution may and should be interpreted so as to direct the discharge of the Debtor's First Terminal and Unifying Bonds upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender.

Discriminations, arbitrary and unjust, must occur unless the Joint Resolution is given in fact the full reach which its language literally commands, so as to direct the discharge of "every obligation" payable in money of the United States "heretofore or hereafter incurred", "whether or not any such provision is contained therein or made with respect thereto", dollar for dollar in legal tender currency.

Not only does the construction of the Joint Resolution for which the petitioner contends work an arbitrary and unreasonable discrimination in this instance, but it cannot explain cases already decided or provide a reasonable solution for cases which may arise hereafter.

We agree that the Joint Resolution applies only to obligations payable in money of the United States. Paragraph (b) of the Joint Resolution makes any other construction untenable. Consequently, the statute does not affect a contract to deliver a commodity only, a contract to pay foreign moneys only, or a contract to deliver gold bullion only (although it may be difficult to establish dam-

ages at this time for breach of a gold bullion contract). Where, however, the contractual duty in one of the above respects arises by reason of a provision contained in or made with respect to an obligation payable in money of the United States, the second sentence of the Joint Resolution prescribes the discharge of the obligation, dollar for dollar, in legal tender. The courts, in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company* (C. C. A. 2), 81 F. (2d) 11, 12 (certiorari denied, 298 U. S. 655), and in *McAdoo* v. *Southern Pacific Company* (Dist. Cal.), 10 F. Supp. 953, 954, reversed 82 F. (2d) 121, were under a misapprehension if, as appears likely from the opinions, they thought that the defendants were contending that a contract solely to pay foreign moneys was invalid under the Joint Resolution.

The first and most extended opinion supporting the position of the petitioner and arguing for the non-application of the second sentence of the Joint Resolution to a contract to pay United States gold coin, or, at the holder's option, foreign moneys, was the dissenting opinion of Mr. Justice Merrell in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634, 644, 280 N. Y. Supp. 494, 505, and his argument has been much relied upon by those who have taken the side of the case which he espoused, cf. petitioner's brief, pages 73, 81. It is summed up in this sentence:

> "It seems perfectly plain to me that, where the contract here gave to the obligee the right to require payment by the obligor in either of three different places, in the currency mentioned in the coupon, when the option was exercised the contract must be read as though the obligor had contracted to do only that which was required by the obligee."

In other words, this argument is that where the option was exercised to take guilders, the bonds should be read as if they were never payable in United States money, and thus

regarded as outside of the reach of the Joint Resolution which deals only with obligations payable in money of the United States. Without considering the lack of logical basis for holding that a contract which was payable in United States money should be regarded as not payable therein *ab initio* because the promisee chose a substituted performance, it is sufficient to point out that the argument proves too much, and it was necessarily repudiated by this Court in *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324. If there is an obligation to pay $100 in United States gold coin, or 2,580 grains of gold, at the promisee's option, upon the exercise of the option for gold, the contract, under Mr. Justice Merrell's argument, should be regarded as solely a contract for the delivery of gold, not one for the payment of money, and without the reach of the Joint Resolution. Manifestly, this defeats the application of the Joint Resolution to a case which it was designed to cover. When this Court in *Holyoke Power Co.* v. *Paper Co., supra,* had a contract before it providing for alternative performance by delivery of gold bullion or currency measured by gold bullion, it did not find that the present desire of the promisee to have gold bullion made the obligation one not for the payment of United States money, but instead it held the Joint Resolution to be applicable. It is beside the mark to distinguish the *Holyoke Power Co.* v. *Paper Co.* decision, as is done by petitioner, its brief, page 68, upon the ground that it involved the delivery of gold bullion. A contract to deliver gold bullion is not within the reach of the Joint Resolution if it is not contained in or made with respect to an obligation payable in money of the United States—and, if the obligation is one to pay in money of the United States, it is to be discharged, dollar for dollar, in legal tender. Neither may the *Holyoke* case be distinguished, as argued by petitioner below, on the ground that the option there was in the promisor, instead of the promisee. The fact, in the instant case, that the bondholders have the unqualified election and enforceable right to demand dollars

clinches the conclusion that the bonds were payable in money of the United States.

The petitioner urges that the Joint Resolution could not in reason apply to all contracts performable alternatively by payment in money or by delivery of a commodity. It cites, page 97 of its brief, the example of a contract to deliver a commodity or to pay $100 as a penalty or as liquidated damages. The initial inquiry in the application of the Joint Resolution is whether the contract is truly a contract payable in money of the United States—a money contract. This inquiry cannot be answered solely by examination of the phraseology of the contract, but the consideration and the surrounding circumstances must also be considered. The answer is plain where the contract is for the delivery of a commodity or the payment of money as a penalty or as liquidated damages. Such contracts are primarily commodity contracts, and the money alternatives are secondary thereto. They are not money contracts coming within the scope of the Joint Resolution. The inquiry which the Court must make in order to determine whether an alternative obligation is primarily an obligation payable in money of the United States so as to be within the reach of the Joint Resolution, is akin in scope and in the elements to be considered to the inquiry which a Court makes in connection with an alternative contract to ascertain whether it is a true alternative contract or whether one of the alternatives is merely a penalty. In making the inquiry as to whether a contractual provision is really a penalty, this Court said, *Embrey* v. *Jemison*, 131 U. S. 336, 344: "The mere form of the transaction is of little consequence. * * * The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties." The rule is expressed in *Restatement, Contracts,* Section 325, Comment b, as follows: "It is not every promise that is expressed in the form of an alternative that imposes a duty on the promisor of performing whichever alternative he sees fit. As

the question of liquidated damages or penalty is based on equitable principles, its determination cannot depend on the form of the transaction but rather on its substance." Just as the Court in enforcing the judge-made rule of public policy that penalties are unenforceable must examine the consideration for and the circumstances surrounding an alternative contract in order to determine whether a particular alternative is a penalty or not, so must the Court in applying the Congressional rule of public policy enacted in the Joint Resolution examine the consideration for and the circumstances surrounding an alternative contract for the payment of money or the delivery of a commodity, to ascertain whether it is in truth a money contract within the reach of the Joint Resolution.

When viewed in this light, the contention (brief of petitioner, p. 47; brief of *amicus curiae*, p. 16) loses point that a bondholder should be no worse off because his bond contained several alternatives than if it were a bond payable solely in Dutch guilders. Under the facts in this case, the bond was a United States money contract, and the foreign money options were but another method of securing the equivalent in value of United States gold coin. There is no attempt to give the language of the Joint Resolution one meaning under one set of circumstances, and another meaning under another set of circumstances (see p. 86, petitioner's brief). The meaning of the Joint Resolution remains constant, but its application to varying transactions will depend upon the intent of the parties thereto and the surrounding circumstances as well as upon the words of the contracts involved.

Counsel upon the petitioner's side of the case have argued that the second sentence of the Joint Resolution should be limited by confining it to directing the method of discharge of obligations payable in money of the United States which contain a provision specifically mentioned in the first sentence of the Joint Resolution and no other provision. We are at a loss to understand the basis for this

contention when the statute itself directs the method of payment of every obligation payable in money of the United States *whether or not* any of such provisions is contained therein. The Committee reports and the debates of Congress emphasize the second sentence of the Joint Resolution equally with the first sentence (Respondent Henwood's brief, p. 88). Congress intended to deal in a comprehensive way with the discharge of United States money contracts and it did so by the command of the second sentence of the Joint Resolution.

The Joint Resolution applies to contracts to be made in the future as well as to those made in the past. So far as the future is concerned, it would have been of small use to have proscribed provisions of certain wording contained in an obligation to pay money of the United States if a creditor remained free to insist upon the insertion of other provisions in United States money bonds accomplishing the same result and casting the burden of a future devaluation of the dollar upon the debtor. To meet this contingency, Congress in the second sentence of the Joint Resolution dealt comprehensively with the discharge of every obligation payable in money of the United States. If it be determined that the Joint Resolution does not touch contracts of the character under discussion, there is no reason why in the future bonds will not be drawn so as to provide for payment in United States money or optionally in moneys of various countries, thus assuring the purchasers of the bonds substantially the same protection against devaluation of the United States dollar as was provided by the gold clause customarily inserted in bonds in the past. Other contractual provisions to be inserted in United States money bonds to accomplish the same object could well be devised. And such provisions, if efficacious, interfere to the same extent as the gold clause with the constitutional power of Congress to regulate the value of money.

The use of foreign money options in the future, if their validity is upheld, to accomplish the purpose of gold clauses

is not a fancied danger. In the Wall Street Journal of January 12, 1939, a news item appears of a dollar option being inserted in a loan contracted by French railway companies in lieu of the gold clause theretofore used in previous bonds. In carefully guarded language, petitioner on page 85 of its brief concedes that "conceivably" a foreign money option provision in a United States money obligation may serve the same purpose as a gold clause and be condemned as an "evasion" (see also p. 35, petitioner's brief). Petitioner guards this concession by limiting it to obligations contracted after June 5, 1933. But the statute applies to all United States money obligations "heretofore or hereafter incurred." If a contract comes within the Joint Resolution it is because it is an obligation payable in money of the United States, and the same criteria will be applicable in determining that fact whether the obligation was executed in 1912 or in 1939. The first sentence of the Joint Resolution dealt with certain specific contractual provisions. The second sentence of the Joint Resolution provided a rule of performance after June 5, 1933, for all obligations payable in money of the United States, whether entered into before or after that date. A provision in an obligation, whenever contracted, the performance of which, after June 5, 1933, would defeate the statutory command that after that date a United States money obligation should be discharged, dollar for dollar, in United States legal tender, is unenforceable.

It is established in the record in this case that the number of guilders specified in the guilder option was regarded as the fair equivalent of the United States gold coin in which the bonds were payable. If a bond had been drawn specifically providing for the payment of $1,000 in United States gold coin or the fair equivalent of that amount of gold coin in foreign moneys, we presume that there would be little question as to the application of the Joint Resolution, and that the bond would be dischargeable, dollar for dollar, in United States currency. Here, reading bond and

indenture together, the contract is for the payment of $1,000 in United States gold coin, or 2,490 guilders, the agreed fair equivalent of that amount of United States gold coin, at the option of the holder. The parties thus agreed upon the number of guilders constituting a fair equivalent of the gold coin of the weight and fineness existing at the time the bonds were issued. The effect of this agreement, solely as a contractual matter, in the absence of legislation, was to prevent a diminution in the amount of guilders called for by the contract when the gold content of the United States dollar was reduced, but the guilder provision nevertheless continued to be an adjunct to and a provision in a gold coin contract. It is no answer to the application of the Joint Resolution to point out, as petitioner does on page 27 of its brief, that the Debtor was aware of the effect of the foreign money options in possibly requiring it to furnish foreign exchange at its own expense. The Joint Resolution is expressly in derogation of existing agreements. It is impossible, we think, to say that the mere specification of the number of guilders considered to be the fair equivalent of United States gold coin took the contract beyond the reach of so comprehensive an expression of the public policy of the United States as the Joint Resolution of Congress of June 5, 1933.

Respectfully submitted,

George L. Buland,
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Southern Pacific Company.

Ben C. Dey,
of Counsel.

APPENDIX

(Public Resolution—No. 10—73rd Congress)
(H. J. Res. 192)

Joint Resolution

To Assure Uniform Value to the Coins and Currencies of the United States.

'hereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

'hereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives the United States of America in Congress assembled, lat (a) every provision contained in or made with spect to any obligation which purports to give the ligee a right to require payment in gold or a particular ıd of coin or currency, or in an amount in money of the ıited States measured thereby, is declared to be against blic policy; and no such provision shall be contained in made with respect to any obligation hereafter incurred. 'ery obligation, heretofore or hereafter incurred, ıether or not any such provision is contained therein or ade with respect thereto, shall be discharged upon payent, dollar for dollar, in any coin or currency which at

the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of Section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

> "All coins and currencies of the United States (including Federal reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4:40 P. M.